

(f) Each exhibit offered in evidence or marked for identification shall be filed and retained in the NAO case record.

§ 906.10 Evidence.

(a) The Federal Rules of Evidence do not apply to NAO proceedings.

(b) An appellate officer will decide whether to admit evidence into the NAO case record.

(1) An appellate officer may exclude unduly repetitious, irrelevant, and immaterial evidence. An appellate officer may also exclude evidence to avoid undue prejudice, confusion of the issues, undue delay, waste of time, or needless presentation of cumulative evidence.

(2) An appellate officer may consider hearsay evidence.

(c) Copies of documents may be offered as evidence, provided they are of equal legibility and quality as the originals, and such copies shall have the same force and effect as if they were originals. If an appellate officer so directs, a party shall submit original documents to the appellate officer.

(d) An appellate officer may take official notice of Federal or State public records and of any matter of which courts may take judicial notice.

(e) An appellate officer may request, and the program office that issued the initial administrative determination in the case before the appellate officer will provide, the interpretation(s) of the law made by the program office and applied to the facts in the case.

§ 906.11 Hearing.

(a) *Procedures.* (1) An appellate officer in his or her discretion may order a hearing taking into account the information provided by an appellant pursuant to § 906.3(b)(3) and whether an appellate officer considers that a hearing will materially advance his or her evaluation of the issues under appeal. In exercising his or her discretion, an appellate officer may consider whether oral testimony is required to resolve a material issue of fact, whether oral presentation is needed to probe a party's position on a material issue of law, and whether a hearing was held previously for the same appeal. If an appellate officer determines that a hearing is not necessary, then the appellate

officer will base his or her decision on the NAO case record. In the absence of a hearing an appellate officer may, at his or her discretion, permit the parties to submit additional materials for consideration.

(2) If an appellate officer convenes a hearing, the hearing will be conducted in the manner determined by NAO most likely to obtain the facts relevant to the matter or matters at issue.

(3) NAO shall schedule the date, time and place for the hearing. NAO will notify the parties in writing of the hearing date, time and place at least 10 days prior to the hearing unless the Chief of NAO orders a shorter period for providing notice or conducting the hearing. A party can request one change in the scheduled hearing date. In determining whether to grant the request, NAO will consider whether the requesting party has shown good cause for the change in date.

(4) At the hearing, all testimony will be under oath or affirmation administered by an appellate officer. In the event a party or a witness refuses to be sworn or refuses to answer a question, an appellate officer may state for the record any inference drawn from such refusal.

(5) An appellate officer may question the parties and the witnesses.

(6) An appellate officer will allow time for parties to present argument, question witnesses and other parties, and introduce evidence consistent with § 906.10.

(7) Parties may not compel discovery or the testimony of any witness.

(b) *Recording.* An appellate officer will record the hearing unless the appellant consents to proceed without a recording.

(c) *Format.* At the discretion of NAO, hearings may be conducted by telephone, in person, or by teleconference or similar electronic means.

§ 906.12 Closing the evidentiary portion of the NAO case record.

(a) At the conclusion of the NAO proceedings, an appellate officer will establish the date upon which the evidentiary portion of the NAO case record will close. Once an appellate officer closes the evidentiary portion of the NAO case record, with or without a

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hearing, no further submissions or argument will be accepted into the NAO case record.

(b) NAO in its discretion may reopen the evidentiary portion of the NAO case record or request additional information from the parties at any time prior to final agency action.

§ 906.13 Failure to appear.

If any party fails to appear at a pre-hearing conference or hearing after proper notice, an appellate officer may:

(a) Dismiss the case, or;

(b) Deem the failure of a party to appear after proper notice a waiver of any right to a hearing and consent to the making of a decision based on the NAO case record.

§ 906.14 Burden of proof.

On issues of fact, the appellant bears the burden of proving he or she should prevail by a preponderance of the evidence. Preponderance of the evidence is the relevant evidence in the NAO case record, considered as a whole, that shows that a contested fact is more likely to be true than not true. Appellant has the obligation to obtain and present evidence to support the claims in his or her petition.

§ 906.15 Decisions.

(a) After an appellate officer closes the evidentiary portion of the NAO case record, NAO will issue a written decision that is based on the NAO case record. In making a decision, NAO shall determine whether the appellant has shown by a preponderance of the evidence that the initial administrative determination is inconsistent with the law and regulations governing the initial administrative determination. In making a decision, NAO shall give deference to the reasonable interpretation(s) of applicable ambiguous laws and regulations made by the office issuing the initial administrative determination.

(b) NAO shall serve a copy of its decision upon the appellant and the Regional Administrator. NAO will not provide the case record to the Regional Administrator when issuing its decision.

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§ 906.16 Reconsideration.

(a) Any party may file a motion for reconsideration of an NAO decision issued under § 906.15. The request must be filed with NAO within 10 days after service of NAO's decision. A party shall not file more than one motion for reconsideration of an NAO decision.

(b) The motion must be in writing and contain a detailed statement of an error of fact or law material to the decision. The process of reconsideration is not a forum for reiterating the appellant's objections to the initial administrative determination.

(c) Arguments not raised by a party in his or her motion for reconsideration of a decision will be deemed waived.

(d) In response to a motion for reconsideration, NAO will either:

(1) Reject the motion because it does not meet the criteria of paragraph (a) or (b) of this section; or

(2) Issue a revised decision and serve a copy of its revised decision upon the appellant and the Regional Administrator.

(e) At any time prior to notifying the Regional Administrator pursuant to § 906.17(a), the NAO may issue a revised decision to make corrections and serve a copy of its revised decision upon the appellant and the Regional Administrator.

§ 906.17 Review by the Regional Administrator.

(a) If NAO does not receive a timely motion for reconsideration pursuant to § 906.16(a), receives a timely motion and rejects it pursuant to § 906.16(d)(1), or issues a revised decision pursuant to § 906.16(d)(2) or (e), NAO will notify the Regional Administrator and the appellant, and provide a copy of the case record for its decision or revised decision to the Regional Administrator.

(b) In reviewing NAO's findings of fact, the Regional Administrator may only consider the evidentiary record including arguments, claims, evidence of record and other documents of record that were before NAO when it rendered its decision or revised decision.

(c) The Regional Administrator may take the following action within 30 days of service of NAO's notification